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In The
Supreme Court of the United States
October Term, 1992

ALEXIS E. VELOZ-GERTRUDIS, ZENAIDA FIGUEROA VELOZ, and FELICITA GERTRUDIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

A. Are the intentional torts of assault and battery by Navy personnel during an unauthorized hazing ritual "incident to military service" within the meaning of the *Feres* doctrine? See *Feres v. United States,* 340 U.S. 135 (1950).

B. Is hazing an exception to the *Feres* doctrine?

C. Should *Feres* be overruled?

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OPINIONS BELOW

The U.S. District Court for the Eastern District of New York dismissed Petitioner's Complaint on or about June 6, 1991. See 768 F. Supp. 38 (EDNY 1991) reproduced as Appendix A.

The U.S. Court of Appeals, Second Circuit, sustained the District Court's decision in an unreported opinion, on or about December 20, 1991, reproduced as Appendix B.

JURISDICTION

The jurisdiction of this Court to review the determination of the United States Court of Appeals for the Second Circuit is conferred by 28 U.S.C. Section 1254(1).

The United States Court of Appeals for the Second Circuit filed its decision against Petitioner on December 20, 1991. This decision was issued as a mandate on January 13, 1992.

STATUTES INVOLVED

10 U.S.C. Section 928 - Article 128. Assault.

(a) Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-marshal may direct.

(b) Any person subject to this chapter who -

(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon; is guilty of aggravated assault and shall be punished as a court-marshal may direct.

STATEMENT OF THE CASE

Petitioner, Alexis E. Veloz-Gertrudis, joined the Navy to serve our country. In late November 1989, he was assigned to active duty as a Navy airman recruit aboard the USS Forrestal in the Mediterranean Sea.

In an unlawful hazing incident, his fellow servicemen beat him severely in violation of the Uniform Code of Military Justice, 10 U.S.C. Section 928. Because this hazing incident violated Navy regulations, an internal investigation was conducted. As a result of the investigation, the Navy meted out military discipline to those involved. The Chief Petty Officer in charge was found derelict in the performance of his duties. A non-punitive letter of caution was issued against one sailor. An additional non-punitive letter was issued against a second sailor. A third sailor was

disciplined with non-judicial punishment for a violation of 10 U.S.C. Section 928, assault. Further, the entire crew of the USS Forrestal was re-educated concerning hazing via closed circuit television broadcast to all crew members aboard the Forrestal.

During this unlawful hazing, Airman Veloz-Gertrudis's *back was broken*. His injuries are *lifetime, permanent and crippling*. Following this incident, he was removed from the Forrestal and spent the rest of his Navy service in Naval medical facilities in Jacksonville, Florida and Bethesda, Maryland. He was unable to ever resume active duty. He is currently discharged from the Navy and unemployed; his broken back preventing him from finding useful employment.

Petitioner filed a personal injury claim with the Navy, which was denied. Petitioner filed an action in the United States District Court for the Eastern District of New York. The Government's motion to dismiss the case was granted solely due to the doctrine enunciated by this Court in *Feres v. United States*, 340 U.S. 135 (1950), known as the *Feres* Doctrine, in an extensive opinion by District Judge Reena Raggi, reported at 768 F. Supp. 38 (E.D.N.Y. 1991), and reproduced herein at Appendix A. *The Amended Complaint charges that the Navy negligently failed to supervise its sailors such that violent assaults occurred* in violation of the Uniform Code of Military Justice, Article 128, 10 U.S.C. Section 928, and therefore subjecting the Navy to liability under the Federal Tort Claims Act, 28 U.S.C. Sections 1346 and 2671-2680.

Petitioner then appealed to the United States Court of Appeals for the Second Circuit. In an unpublished decision dated December 20, 1991, the Court of Appeals sustained the decision of the District Court, also on the

authority of the *Feres* Doctrine. This opinion is reproduced as Appendix B.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The basis for federal jurisdiction in the Court of first instance, the United States District Court for the Eastern District of New York, was and is the Federal Tort Claims Act, 28 U.S.C. Sections 1346 and 2671-2680.

REASONS FOR GRANTING WRIT

A. *The intentional torts of assault and battery by Navy personnel during an unauthorized hazing ritual are not "incident to military service" within the meaning of the Feres Doctrine.*

In the *Feres* opinion, this Court held: "we conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen *where the injuries arise out of or are in the course of activity incident to military service.*"
(Emphasis added. See 340 U.S. at 146)

The case of Airman Veloz-Gertrudis is clearly distinguishable. It was definitely an activity incident to service for *Feres* to sleep in the Army barracks when the said barracks unfortunately burned down. The other military personnel in the *Feres* case, Jefferson and Griggs, were injured by unskillful medical treatment in Army hospitals. There can be no question that medical treatment in an Army hospital is incident to military service. However, unauthorized initiation or hazing rituals cannot possibly be said to be "incident to military service." They are by definition unauthorized, and in the instant case, as

in every case, Navy discipline was meted out to those responsible for this *unauthorized* activity.

These issues are discussed in the following cases: See *U.S. v. Brown*, 348 U.S. 110 (1954); *U.S. v. Shearer*, 473 U.S. 52 (1985); *U.S. v. Johnson*, 481 U.S. 681 (1987); *Sheridan v. U.S.*, 487 U.S. 392 (1988); *Durant v. Neneman*, 884 F. 2d 1350 (10th Cir. 1989) *cert denied*, 110 S.Ct. 728 (1990); *Miller v. U.S.*, 643 F. 2d 481 (8th Cir. 1980).

B. *In the alternative, this Court should find that hazing is an exception to the Feres Doctrine.*

In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), this Court decided that the *Feres* Doctrine does not apply to personal injury suits against military contractors. See 487 U.S. at 510. Since this Court was willing to take military contractor tort cases out of the *Feres* Doctrine in *Boyle*, this Court should clearly be willing to take unlawful hazing incidents in violation of 10 U.S.C. Section 928, out of the *Feres* doctrine. Where the military permits an *intentional assault*, it must be held liable.

C. *In the alternative, the Feres Doctrine should be overruled.*

If this Court cannot decide this case upon the narrow ground that hazing and assault are not "incident to military service" within the meaning of the *Feres* Doctrine; and, further, should this Court decide not to create an exception to the *Feres* Doctrine for hazing incidents; then and only then should the *Feres* Doctrine be overruled in its entirety.

In his learned dissent in *U.S. v. Johnson*, cited above, Justice Scalia wrote: "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." See 481 U.S. at 700.

In his majority opinion in *Boyle*, Justice Scalia held that the *Feres* Doctrine should *not* be applied to military contractor tort cases because "...it seems to us that the *Feres* Doctrine, in its application to the present problem, logically produces results that are in some respects too broad and in some respects too narrow." See 487 U.S. at 510.

Airman Veloz-Gertrudis's broken back is an injury that is *lifetime, permanent and crippling*. His employment possibilities are now severely limited. His Naval career was cut short and he served most of his time in the Navy confined to Naval hospitals.

There can be no better case for a thorough review of the *Feres* Doctrine than this one. *What happened to Airman Veloz-Gertrudis was no accident*. This was a negligent failure to supervise resulting in an intentional tort which also constituted a crime under the Uniform Code of Military Justice, Article 128. See 10 U.S.C. Section 928. Substantial punishment was meted out to each and every individual responsible. Quite correctly, the Navy does not tolerate unlawful hazing activity. Mr. Veloz-Gertrudis has sustained substantial lifetime injiries. He will never be the same. He will suffer with a broken back for the rest of his life. What more compelling claim for just compensation can be made?

This Court quite correctly declined to review the *Feres* Doctrine in *Kitowski v. United States*, 931 F.2d 1526 (11th Cir. 1991), cert. denied 60 U.S.L.W. 3334 (November 5,

1991). In *Kitowski*, the serviceman in question died while being held underwater by Naval personnel seeking to simulate the battle conditions of a sinking ship. While this incident was tragic, and could be construed as negligent teaching of ship survival skills, it cannot be said that it was not "incident to military service." It is clearly incident to military service to learn how to survive the battle conditions of a sinking ship.

Contrast the *Kitowski* facts with the unlawful hazing incident that broke Airman Veloz-Gertrudis's back. By no stretch of the imagination can assault and hazing be classed as "incident to military service."

The instant case cries out for Supreme Court review. This Court can solve this case and properly compensate Airman Veloz-Gertrudis in any one of the three ways listed above: a) Finding hazing to be outside the *Feres* Doctrine; or b) Creating an exception to the *Feres* Doctrine for hazing; or c) Overruling the *Feres* Doctrine in its entirety.

This Court cannot permit the Navy to be above the law. Intentional assault is not permitted in the military, just as it is forbidden in civilian life. See 10 U.S.C. Section 928. Just as in civilian life, the victims of assault must be permitted to have their day in court. This is the essence of a civilized society.

Unlike the entire line of *Feres* Doctrine cases, what happened to Airman Veloz-Gertrudis was no accident. Military discipline was meted out to his tormentors *and their supervisors for their failure to supervise*.

Feres was decided 41 years ago in a very different era. It is ripe for review. The individually armed soldiers and sailors who prevailed in World War II have given way to a

high technology force of skilled operators of sophisticated equipment. Just as the military has changed, so the law must change to meet the needs of a very different kind of operation, and the people who staff it.

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should be granted.

Respectfully submitted,

PAUL E. KERSON
Attorney for Petitioners

Dated: March 4, 1992

APPENDIX A

768 FEDERAL SUPPLEMENT 38

Alexis E. VELOZ-GERTRUDIS, Zenaida Figueroa Veloz and Felicita Gertrudis, Plaintiffs,

v.

UNITED STATES of America, Defendant.

No. CV 90-2755(RR).

United States District Court, E.D. New York.

June 6, 1991.
As Amended July 3, 1991.

Former Navy recruit, his wife and his mother sued United States under Federal Tort Claims Act for injuries sustained in hazing incident aboard Navy ship on Military patrol. United States moved to dismiss. The District Court, Raggi, J., held that claims arising from injujries to Navy airman recruit resulting from hazing incident were barred by *Feres* doctrine, even though Navy regulations strictly prohibited hazing.

Motion granted.

1. United States - 78(16)

Claims arising from injuries to Navy airman recruit resulting from hazing incident on board Navy vessel and

subsequent altercations with participants in hazing were barred by *Feres* doctrine, even though Navy regulations strictly prohibited hazing, where claims related to injury sustained incident to service by on duty crew member on board Navy ship then on military patrol, and court inquiry into incident would plainly implicate concerns underlying sovereign immunity protected by *Feres* doctrine. 28 U.S.C.A. §§ 1346, 2671-2680, 2680(d); Suits in Admiralty Act, §§ 1-12, 46 U.S.C.A. §§ 741-752; Public Vessels Act, §§ 1-10, 46 U.S.C.A. §§ 781-790.

2. United States - 78(16)

Feres prohibition against any inquiry into command relationship between service member and his or her superior officers plainly extends to unauthorized, or even illegal actions taken by military personnel.

Leavitt, Kerson & Leffler by Paul E. Kerson, Forest Hills, N.Y., for plainitffs.

Stuart M. Gerson, Asst. Atty. Gen., Andrew J. Maloney, U.S. Atty., Janis G. Schulmeisters, Torts Branch, Civ. Div. by Mark E. Schaefer, Trial Atty., New York City, for defendant.

MEMORANDUM AND ORDER

RAGGI, District Judge:

Alexis E. Veloz-Gertrudis, sues the United States under the Federal Torts Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2671-2680 (1988), for injuries sustained in a hazing incident aboard the U.S. *Forrestal*. His mother,

Zenaida Figueroa Veloz, and his wife, Felicita Gertrudis, also sue for damages related to this incident.

The United States moves to dismiss plaintiffs' complaint, or in the alternative for summary judgment relying on the principles enunciated in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), and its progeny. For the reasons stated herein, the motion to dismiss is granted.

FACTUAL BACKGROUND

For purposes of considering defendant's motion, the court views all facts in the light most favorable to the plaintiffs.

1. *The Hazing Incident*

In late November 1989, twenty-year old Alexis Veloz-Gertrudis was assigned to active duty as a Navy Airman Recruit aboard the *U.S.S. Forrestal*. On the night of January 18, 1990, while the *Forrestal* was in the Mediterranean Sea, Veloz-Gertrudis was the victim of a hazing incident in the ship's engine room. Senior crewmen tied him up with rope and suspended him upside down from an air pressure valve. He was stipped to the waist and grease was smeared over his stomach. Crew members then took turns slapping him on the stomach and chest. When Veloz-Gertrudis sought to avoid the blows by bringing his knees up to his chest, a crew member yanked on the rope by which plaintiff was hanging, forcing his ankles over the top of the valve. Veloz-Gertrudis heard his ankle "pop" and began screaming with pain for the men to stop. Instead, the crewmen continued to strike him, one delivering a series of particularly hard blows in purported retaliation for plaintiff's attempt to kick him.

2. *The Subsequent Altercation and Its Report to Navy Authorities*

When Veloz-Gertrudis was finally released, an altercation ensued between him and one of the men involved in the hazing, in the course of which plaintiff was punched in the face and neck. A short time later, in another part of the ship, the same crewman charged at Veloz-Gertrudis. Plaintiff tried to defend himself, grabbing a screwdriver from a nearby locker. The crew member nevertheless succeeded in throwing Veloz-Gertrudis to the deck. While other cremen held plaintiff face down, the original assailant jumped repeatedly on Veloz-Gertfudis' back.

Subsequently, Veloz-Gertrudis was summoned to a meeting with three participants in the original engine room hazing. Plaintiff overheard them agree not to report the incident in light of their personal involvement. One of the men did authorize Veloz-Gertrudis to go to the ship's medical unit, but stressed that he should tell the examining doctor that his injuries had been sustained falling down a ladder. Because he was afraid, Veloz-Gertrudis agreed to lie.

The severity of plaintiff's injuries required his transfer to a Navy hospital. Upon learning that he would be leaving the *Forrestal*, and after speaking to the ship's priest, Veloz-Gertrudis told senior officials the truth about what had happened.

Thereafter, Veloz-Gertrudis was treated at a military hospital in Spain and at a facility in Jacksonville, Florida.[1]

1. Apparently, while Veloz-Gertrudis was in Jacksonville, the *Forrestal* came into port. During that time, a shot was fired at plaintiff. Although the identity of the shooter was never discovered, because of a possible link between this incident and the hazing, Veloz-Gertrudis was transferred to another facility.

He suffered, *inter alia*, two broken vertebrae, severe post-traumatic stress disorder and an ankle injury. He has been found permanently disabled by the Navy and his discharge application is pending.

3. *The Internal Investigation*

Because hazing is strictly prohibited by the Navy, an internal investigation of the events of January 18, 1990 was conducted. That investigation revealed that plaintiff was an unwilling participant in the hazing. It was also determined that other unauthorized "initiations" had taken place in the past on the *Forrestal*. As a result, several participants in the January 18, 1990 hazing were disciplined. Moreover, certain officers were reinstructed regarding the rules concerning initiations and hazings. Instructions and admonitions were also given via closed-circuit television to all crew aboard the *Forrestal*.

4. *Plaintiffs' Claims*

Plaintiffs initially filed claims for damages with the United States Department of the Navy. These were denied by letters dated May 22, 1990 and July 21, 1990 in light of *Feres*. On AUgust 6, 1990, plaintiffs filed this action. They claim that the United States is liable for the intentional tortious conduct of its subordinates, i.e., the crew members who participated in the hazing. They further claim that the United States is liable for its negligent supervision of the *Forrestal* crew.

DISCUSSION

[1] The United States urges dismissal for lack of subject matter jurisdiction relying on the Supreme Court decision in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153,

95 L.ED. 152 (1950). In *Feres*, the Court held that the United States was not subject to suit under the Federal Torts Claims Act for injuries that "arise out of or are in the course of activity incident to [military] service." *ID.* at 146, 71 S.Ct. at 159. The doctrine applies not simply to suits brought by members of the armed forces, but also to claims made by their families. *See In re Agent Orange Product Liability Litigation,* 506 F.Supp. 762, 780 (E.D.N.Y.1980) (and cases cited therein).[2]

Because *Feres* operates as a "blunt instrument," *Bozeman v. United States*, 780 F.2d 198, 200 (2d CIr.1985), precluding suit in a wide variety of cases, it has

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2. Defendant further seeks dismissal on the ground that plaintiffs' claims are not cognizable under the FTCA, but only under the Suits in Admiralty Act ("SIAA"), 46 U.S.C. §§741-52 (1988), or the Public Vessels Act ("PVA"), 46 U.S.C. §§781-90 (1988). The express terms of the FTCA do bar suit under that statute for claims "for which a remedy is provided by sections 741-752, 781-790 of Title 46...." 28 U.S.C. §2680(d). Moreover, ample case law supports defendant's argument that the causes of action here pleaded are more appropriately raised under these sections of Title 46. *See, e.g., Foremost Insur Co. v. Richardson,* 457 U.S. 668, 673-74, 102 S.Ct. 2654, 2657-58, 73 L.Ed.2d 300 (1982) (admiralty jurisdiction determined by (1) situs of tort, *i.e.,* whether it occurred on navigatible water; and (2) status, *i.e.,* whether the wrong had a significant relationship to traditional maritime activity); *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 261, 93 S.Ct. 493, 501, 34 L.Ed.2d 454 (1972) (same); *Keene Corp. v. United States,* 700 F.2d 836, 843 (2d Cir.) (same), *cert. denied,* 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983). While dismissal for failure to plead under the appropriate statute might generally be accompanied by a grant of leave to replead, because the *Feres* doctrine is equally applicable to suits under the SIAA and PVA, *see, e.g., Cusanelli v. Klaver,* 698 F.2d 82, 85 (2d Cir. 1983); *Bon v. United States,* 802 F.2d 1092, 1094 n. 2 (9th Cir. 1986); *Potts v. United States,* 723 F.2d 20, 21-22 (6th Cir. 1983), *cert. denied,* 466 U.S. 959, 104 S.Ct. 2172, 80 L.Ed.2d 555 (1984), this court's ruling in favor of defendant on the *Feres* question warrants complete dismissal.

The inapplicability of the FTCA to this case, and the applicability of the *Feres* doctrine, make it unnecessary to address that statute's further exception to claims against the United States for assaults and batteries committed by its employees. 28 U.S.C. §2680(h). Neither must the court resolve the scope of that exception to the particular claims here pursued. *See generally Sheridan v. United States,* 487 U.S. 392, 108 S.Ct. 2448, 2455, 181 L.Ed.2d 252 (1088) (exception applies to intentional tort but not to claim of negligent supervision).

been frequently criticized, *see, e.g., United States v. Johnson*, 481 U.S. 681, 107 S.Ct. 2063, 2074n.*, 95 L.Ed.2d 648 (1987)(Scalia, J., dissenting)(cases and commentators cited therein). Nevertheless, both the Supreme Court and the Second Circuit recognize its continuing viability. *See United States v. Johnson*, 107 S.Ct. at 2067-70 (majority upholds *Feres* doctrine and declines to modify it); *accord Sanchez v. United States*, 878 F.2d 633 (2d Cir.1989) (applying *Feres* in light of *Johnson*). This court must do likewise.

Plaintiffs contend that, even if *Feres* is good law, it is not applicable to this case since hazing, the activity in which Veloz-Gertrudis was injured, is prohibited by the Navy. ALthough this court recognizes—and, indeed, respondent concedes—that hazing is not authorized on any Navy ship, this does not by itself mandate a finding that plaintiff's injuries were not incident to his military service of that *Feres* does not apply.

Although "neither the [FTCA] nor the opinions of the Supreme Court have indicated definitively the full meaning of the phrase 'incident to service,' " *see 1 Jayson, Handling Federal Tort Claims* § 155.01, at 5-66 (1990), courts have interpreted the phrase broadly and found it applicable to any loss or injury occurring under circumstances rationally connected to a serviceman's status in the armed services. *E.g., Woodside v. United States*,

606 F.2d 134, 141 (6th Cir.1979); *In re Agent Orange Product Liability Litigation*, 506 F.Supp. at 775 (and cases cited therein); *Camassar v. United States*, 400 F.Supp. 894, 897 (D.COnn.1975), *aff'd*, 531 F.2d 1149 (2d Cir. 1976) (per curiam); 1 Jayson, *Handling Federal Tort Claims* § 155.02, at 5-68 (and cases cited therein). Thus, *Feres* has not been limited to those cases in which servicemen have been injured in the course of actual military operations. *See In re Agent Orange Product Liability Litigation*, 506 F.Supp. at 775 (quoting *Hass v. United States*, 518 F.2d 1138, 1141 (4th Cir. 1975). Neither has its applicability been dependent upon an injury occurring while a serviceman was acting pursuant to orders. See *Woodside v. United States*, 606 F.2d at 141. *Feres* has barred claims as diverse as those involving injury to an Air Force officer sustained while he was training for a commerical pilot's license at a military-sponsored club, *id.* at 142; to a service member riding a horse rented from a military stable, *Hass v. United States*, 518 F.2d at 1141, and even to a military policeman killed in an off-base accident allegedly caused by his drunk-driver companion who had become intoxicated at an NCO club, *Bozeman v. United States*, 780 F.2d at 200-01.

In reaching these results, courts have identified a number of factors relevant to the applicability of *Feres*. Was the serviceman on duty when the injury was sustained? Was the serviceman, regardless of his duty status, on a military base or craft, and therefore subject to military control or discipline, at the time of the injury? Was he engaged in a military mission? Was he enjoying a privilege related to or dependent upon his military status at the time of the injury? A number of decisions suggest that an affirmative answer to any one of these questions suffices to bring the matter within the bounds of *Feres*. *E.g.*, *Woodside v. United States*, 606 F.2d at 141; *Hass v. United States*,

518F.2d at 1141; *In re Agent Orange Product Liability Litigation*, 506 F.SUpp. at 776. OTher courts urge that the factors be reviewed flexibly in light of the circumstances of a particular case. E.g., *Miller v. United States*, 643 F.2d 481, 493 (8th Cir. 1981) (en banc); *Stanley v. Central Intelligence Agency*, 639 F.2d 1146, 1151 (5th Cir. 1981); *see generally 1 Jayson, Handling Federal Tort Claims* § 155.02, 5-77 to 5-78 (and cases cited therein).

Whichever approach is here followed, the factors weigh against plaintiffs' maintenance of this lawsuit. There is no question that Veloz-Gertrudis was on active duty on board a Navy ship detailed to patrol the Mediterranean Sea at the time of the hazing. Neither he nor any other individual involved in the incident would have been on board that ship but for military assignment. Thus, the injury sustained by plaintiff, whether the result of authorized activity or not, must be deemed to have occurred incident to service in the United States military.

Plaintiffs' contention that an injury cannot be sustained incident to service if it originates in unauthorized or forbidden activity ignores the rationale behind the *Feres* doctrine. Civil suits by servicemen for injuries sustained incident to their military service are barred because of: (1) concern for the distinctly federal relationship between the United States and its military personnel, which should not be subject to various legal standards based on the fortuity of where an injury occurs; (2) the presence of an alternative compensation and benefit scheme for military personnel; and (3) the potential for undue disruption of military discipline. Although, for a time, the third factor seemed most important, *see United States v. Shearer*, 473 U.S. 52, 58 n. 4, 105 S.Ct. 3039, 3043 n. 4, 87 L.Ed.2d 38 (1985), the Supreme Court has recently reaffirmed the vitality of all three *Feres* rationales, *United States v. Johnson*, 107 S.Ct. at 2068-69; *accord Sanchez v. United States*, 878 F.2d at 635.

In this case, all three rationales are implicated. Veloz-Gertrudis was injured on board a Navy ship patrolling the Mediterranean. It would obviously intrude upon the uniquely federal relationship between the United States and individuals serving in its Navy if the government were to be held accountable in various jurisdictions for torts occurring to its servicemen while its ships were at sea. Moreover, Veloz-Gertrudis has received treatment for his injuries at Navy hospitals. Indeed, he is eligible for future treatment and disability benefits pursuant to the military's alternative compensation and benefit scheme.

Finally, and most obvious in this case, pursuit of plaintiffs' claim would impermissibly intrude on military discipline. The crux of the claim is, after all, that the Navy fails to take the steps necessary to prevent hazings on board its ships. Resolution of this claim would require "commanding officers ... to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions" that they have made regarding the operation of a ship and the supervision of the crew members who serve on it. *See United States v. Shearer,* 473 U.S. at 58, 105 S.Ct. at 3043. This is clearly barred by *Feres. See, e.g., id.; Bozeman v. United States,* 780 F.2d at 202; *Brown v. United States,* 739 F.2d 362, 369 (8th Cir. 1984).

[2] This prohibition against any inquiry into "the command relationship between a service member and his or her superior officers," *Brown v. United States,* 739 F.2d at 369, plainly extends to unauthorized, or even illegal actions taken by military personnel. In *United States v. Shearer, supra,* one off-duty serviceman was killed by another in an incident off-base, clearly an unlawful act. The complaint was that the military had failed to take appropriate preventive action given their knowledge that the killer had a previous conviction for manslaughter. The

Supreme Court found that the suit barred by *Feres.* In *Bozeman v. United States, supra,* an off-duty serviceman was killed in an off-base drunk driving accident, an activity not authorized by military authorities. The car's driver had become intoxicated at an on-base club. The complaint was that the Army negligently permitted alcoholic beverages to be served in such clubs in an irresponsible manner. Once again, *Feres* required dismissal. In *Brown v. United States, supra,* a case with disturbing parallels to this one, an off-duty black National Guardsman was the victim of a "mock lynching" conducted at an on-base party. The complaint charged that base officials failed to take the steps necessary to prevent this plainly unauthorized occurrence. The court relied on *Feres* to dismiss the complaint as against the United States.

Not insignificantly, the court in *Brown* permitted the case to go forward against the individual guardsmen who had participated in the incident, drawing a distinction between the scope of *Feres* when suit was brought against the United States and when it was brought against military personnel for acts unrelated to their duties. *Brown v. United States,* 739 F.2d at 367-69. The distinction was approved in *Durant v. Neneman,* 884 F.2d 1350 (10th Cir. 1989), a case relied on by plaintiffs. There, suit was permitted against the serviceman driver of a private vehicle that struck and killed a soldier on a military base. But no claim was even raised as against the United States, and the court distinguished between the strict standards applicable to "true *Feres*" actions against the sovereign and the more flexible standards applicable to suits by one serviceman against another for "non-military acts." *See id.* at 1352-54. Plaintiffs pursue this action only as against the United States. Thus, *Durant* is not squarely applicable.

This court dismissed plaintiffs' case for lack of subject matter jurisdiction since it relates to injuries sustained incident to service by an on-duty crew member on board a

Navy ship then on military patrol, and since court inquiry into the incident would plainly implicate all three of the concerns that underlie the sovereign immunity protected by the *Feres* doctrine.

CONCLUSION

The motion to dismiss this action is granted in light of *Feres v. United States, supra,* and its progeny.

SO ORDERED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of December, one thousand nine hundred and ninety-one.

Present:
HONORABLE THOMAS J. MESKILL,
HONRABLE AMALYA L. KEARSE,
HONORABLE RALPH K. WINTER,
Circuit Judges.

ALEXIS E. VELOZ-GERTRUDIS; ZENAIDA FIGUEROA VELOZ; FELICITA GERTRUDIS,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Docket No. 91-6209

This is an appeal from a judgment entered in the United States District Court for the Eastern District of New York, Raggi, *J.*, dismissing plaintiffs-appellants Alexis E. Veloz-Gertrudis, Zenaida Figueroa Veloz and Felicita Gertrudis' complaint. Plaintiffs-appellants sued the United tates under the Federal Torts Claim Act, 28 U.S.C. §§1346, 2671-2680, for injuries sustained in a hazing incident aboard the U.S.S. FORRESTAL, a Navy vessel. The district court dismissed the complaint for lack of subject matter jurisdiction relying on the principles

enunciated in *Feres v. United States,* 340 U.S. 135 (1950) and its progeny.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of the district court be and it hereby is AFFIRMED substantially for the reasons set out in Judge Raggi's Memorandum and Order published at 768 F.Supp. 38 (E.D.N.Y. 1991).

s/ Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

s/ Amalya L. Kearse
Amalya L. Kearse, U.S.C.J.

s/ Ralph K. Winter
Ralph K. Winter, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

A TRUE COPY
ELAINE B. GOLDSMITH
s/ Elaine B. Goldsmith
Clerk